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NO. 90-8400

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19 91

DAVID E. RIGGINS, Petitioner

vs.

STATE OF NEVADA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEVADA

Respectfully submitted,

MACE J. YAMPOLSKY, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner

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SUPREME COURT, U.S.

QUESTION PRESENTED FOR REVIEW

Whether forced medication during trial violates a
defendant's constitutional right to a full and fair trial.

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UNITED STATES CONSTITUTION

Fifth Amendment

Eighth Amendment

Fourteenth Amendment

920 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101-6863
(702) 384-9563

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vs.

STATE OF NEVADA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF NEVADA

David E. Riggins petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Nevada.

OPINION BELOW

The Order of the Nevada Supreme Court is attached to this Petition as Exhibit "A".

JURISDICTION

The Judgment of the Nevada Supreme Court was entered March 28, 1991 (Exhibit "A"). This Petition For Writ of Certiorari was filed within the statutorily prescribed time period after a Motion To Stay Remittitur pending a Writ of Certiorari was granted by the Nevada Supreme Court on April 15, 1991 (Exhibit "B"). The Court also granted a motion extending the Stay until June 15, 1991 (Exhibit "C"). This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

. . .nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

2. The Eighth Amendment to the United States Constitution demands that cruel and unusual punishment shall not be inflicted.

3. The Fourteenth Amendment to the United States Constitution provides in relevant part:

. . .nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

DAVID EDWARD RIGGINS was arrested on November 20, 1987. Shortly after his arrest, he was medicated with 25 milligrams of Mellaril per day under advisement of the prison psychiatrist. On December 14, 1987, Mace J. Yampolsky, Esq., was appointed as Counsel for Defendant (ROA 277). DAVID RIGGINS was charged, by information filed April 5, 1988, with Robbery With Use of a Deadly Weapon, N.R.S. 200.380, N.R.S. 193.165, and Murder with Use of a Deadly Weapon, N.R.S. 200.010, N.R.S. 200.030, N.R.S. 193.265 (ROA 48). A Preliminary Hearing was held March 25, 1988 before the

Honorable Daniel E. Ahlstrom, Justice of the Peace (ROA 295). Defendant was bound over on two counts, Robbery with Use of a Deadly Weapon, and Murder with Use of a Deadly Weapon to District Court (ROA 399).

On January 20, February 17, 18, 19, 24 and March 9, 1988, Defendant's Arraignment was held before the Honorable Judge James Brennan in the Clark County District Court (ROA 47). On March 9, 1988, after being examined by three psychiatrists, defendant RIGGINS was found competent to stand trial. Dr. Jack Jurasky opined that defendant RIGGINS was incompetent, but Dr. William O'Gorman and Dr. Franklin Master decided DAVID RIGGINS was competent. He was being medicated with Mellaril at the time he was examined.

A Motion for Individual Sequestered Voir Dire was filed on June 9, 1988, but was denied (ROA 52, 108). On June 10, 1988, defense counsel submitted a notice of insanity defense. Also on June 10, 1988, a Motion to Terminate the Administration of Medication was filed, and denied, and an Ex Parte Motion to Allow Defendant to Wear Civilian Clothes During the Trial was filed, and granted (ROA 63). In addition, an Ex Parte Motion for an Order Appointing Co-Counsel was filed September 30, 1988, and was denied (ROA 124, 127).

A jury trial was held November 7, 8, 9, 14, and 15, 1988 before the Honorable Judge James Brennan (ROA 512-919). Defendant RIGGINS was convicted of Robbery with Use of a Deadly Weapon, and Murder with Use of a Deadly Weapon (ROA 275). The penalty hearing was held November 16 and 17, 1988, and the jury

1 sentenced the Defendant to DEATH by lethal injection (ROA 276).
2 Defendant RIGGINS was sentenced to DEATH by lethal injection
3 for Murder with use of a Deadly Weapon. Defendant was further
4 sentenced to fifteen years imprisonment for Robbery, and
5 fifteen years imprisonment for the Use of Deadly Weapon. The
6 two sentenced in Count I were ordered to run consecutively but
7 concurrently to the sentence imposed in Count II (ROA 276).

8 The instant appeal is from the Defendant's judgment
9 of conviction.

10
11 STATEMENT OF FACTS

12 Early in the morning at 1:30 a.m. on Friday, the 20th
13 of November, 1987, DAVID RIGGINS spoke to Paul Wade on the
14 telephone to arrange a meeting to purchase some cocaine (ROA
15 529). Soon thereafter, RIGGINS asked his roommate, Lowell
16 Pendrey, if he could borrow Pendrey's car to go to a friend's
17 house. Pendrey would not allow RIGGINS to borrow his car, but
18 offered to provide transportation to the friend's house (ROA
19 528). At approximately 2:00 a.m., RIGGINS and Pendrey drove to
20 Paul Wade's apartment. RIGGINS went in alone, and left Pendrey
21 waiting in the car (ROA 531). RIGGINS was in the apartment
22 approximately 20 minutes, and returned to Pendrey's car with no
23 change in his demeanor (ROA 534). Later that morning at
24 approximately 3:00 a.m., Patricia Bezian, Paul Wade's
25 girlfriend and roommate took her scheduled lunch break from
26 work, and went home to find out why Wade was not answering the
27 telephone (ROA 530). She found Wade lying on his stomach, dead
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1 in a pool of blood (ROA 530). Paul Wade died of multiple cut
2 and stab wounds to the head, trunk, and limbs (ROA 546). There
3 were 32 stab wounds in all (ROA 533).

4 DAVID RIGGINS testified that he has been hearing
5 voices since he was four years old, and that originally he
6 thought they were aliens, but later found out from his minister
7 that they were the devil, trying to possess his body (ROA 711).
8 RIGGINS stated on the morning of the incident, he had gone over
9 to Paul Wade's to buy some cocaine, and once inside the
10 apartment, Wade began attacking RIGGINS with the knife. After
11 Wade had been injured seriously, he told RIGGINS to leave and
12 take his jacket with him (ROA 723).

13 RIGGINS stated that the homicide was justified
14 because Wade had killed two little girls in the past, and had
15 also tried to kill RIGGINS before by putting fiberglass in his
16 water supply and by squirting his AIDS infected blood on
17 cocaine before selling it to RIGGINS. Fiberglass in water to
18 be used for shooting cocaine would cause blood clots and death
19 (ROA 716, 723).

20 RIGGINS stated that he had been admitted to a mental
21 institution six months prior to the incident, and had been
22 given medication for his condition (ROA 740). RIGGINS stated
23 that he was not on any prescription medications on the morning
24 of the incident, but at trial was taking 800 milligrams of
25 Mellaril per day (ROA 741).
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REASONS FOR GRANTING THIS WRIT

This case is important to Petitioner because he was medicated against his will which did not allow the jury to see his "true" demeanor. As a result of the denial of his constitutional rights he now faces death by lethal injection.

The death penalty may not be imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, (1976). Instead, the statutory scheme "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). The Court has allowed each state to fashion its own statute as long as these general principles are followed. See, Jurek v. Texas, 428 U.S. 262 (1976), Proffitt v. Florida, 428 U.S. 242 (1976).

AUTHORITIES AND ARGUMENT

THE COURT'S REFUSAL OF DEFENDANT'S MOTION TO TERMINATE THE ADMINISTRATION OF MEDICATION VIOLATED DEFENDANT'S RIGHT TO A "FULL AND FAIR" TRIAL.

Prior to jury selection, defense counsel filed a Motion to Terminate the Administration of Medication. Defendant RIGGINS was under the influence of 800 milligrams of Mellaril per day. Mellaril is an antipsychotic drug, one of four major classes of psychotropic drugs used to treat mental illness. This

medication violated DAVID RIGGINS' right to be free from bodily restraint, and ultimately his right to a "full and fair" trial. The medication denied DAVID RIGGINS the ability to assist in his defense. His demeanor, appearance and attitude were chemically cauterized and sanitized for the jury.

This is a case of first impression in Nevada, therefore, there is no applicable state case law on the subject. However, there are several other jurisdictions that have ruled on the subject.

Several cases have held that an individual has a due process right to freedom from arbitrary forcible administration of chemical restraints. Youngberg v. Romeo 102 S.Ct. 2458 (1982), Large v. Superior Court 148 Ariz. 229, 714 P.2d 399, U.S. v. Watson 893 F.2d 970 (8th Cir. 1990). The United States Supreme Court in Youngberg v. Romeo, Id. at 2458, held that liberty from bodily restraint as well as liberty from chemical restraint, has always been recognized as the core liberty protected by the Due Process Clause from arbitrary government action. This interest survives criminal conviction and incarceration. A similar decision was rendered in Large v. Superior Court, Id. at 406, where the Supreme Court of Arizona stated:

"Notwithstanding his status as a convicted prisoner, petitioner retains the right to due process protection against arbitrary government action. Liberty from arbitrary chemical restraint survives criminal conviction and incarceration just as liberty from arbitrary bodily restraint survives both civil and involuntary commitment."

Defendant RIGGINS should not have been forced to take medication against his will, as his freedom from chemical

1 restraint is protected by the Due Process Clause of the
2 Fourteenth Amendment.

3 This court further stated:

4 "The medical nature of the procedure does not justify
5 dispensing with due process requirements. The mere fact
6 that a doctor authorized the forcible administration of
7 the drugs is not conclusive. Due process requires that
8 courts 'make certain' that proper professional judgment
9 was 'in fact' exercised in the denial of a liberty
10 interest."

11 Although the administration of Mellaril to defendant
12 RIGGINS was authorized by a psychiatrist, this does not
13 ameliorate the fact that he was denied a liberty interest
14 provided to him by the Fourteenth Amendment.

15 There are also at least two separate Fifth Amendment
16 violations present in a state's decision to compel one who is
17 presenting an insanity defense to be medicated in order to
18 stand trial. First, such medication and the altered demeanor
19 that accompanies it compels the defendant to be the instrument
20 of his own conviction, thus violating the privilege against
21 self-incrimination. Second, by effectively mandating the
22 presentation of this altered demeanor, the state considerably
23 lightens its own burden at trial, violating the fundamental
24 precept of our adversarial system of justice that the state
25 must shoulder the burden of proving its case against the
26 individual. Fentiman, *Whose Right is it Anyway?: Rethinking*
27 *Competency to Stand Trial in Light of the Synthetically Sane*
28 *Insanity Defendant*, 40 U. Miami L.Rev. 1161.

By forcing DAVID RIGGINS to be medicated in order to stand
trial, the State of Nevada violated his privilege against self-

1 incrimination, while at the same time reduced its own burden to
2 refute the insanity defense at trial.

3 An individual cannot be forcibly medicated with
4 antipsychotic drugs unless he is a danger to himself or others,
5 or unless there is an emergency situation. In Washington v.
6 Harper 110 S.Ct. 1039 (1990), the U.S. Supreme Court held that,
7 given the requirements of the prison environment, the Due
8 Process Clause permits the state to treat a prison inmate who
9 has a serious mental illness with antipsychotic drugs against
10 his will, if the inmate is dangerous to himself or others and
11 the treatment is in the inmate's medical interest. This is
12 consistent with the decision of U.S. Court of Appeals in Bee v.
13 Greaves 744 F.2d 1394 (1984), that due process requires that a
14 qualified professional determine that the forcible
15 administration of medication is, in his or her opinion,
16 necessary to assure everyone's safety.

17 In the instant case the reason DAVID RIGGINS was medicated
18 was never provided. He was medicated immediately after being
19 taken into custody. There is no evidence defendant RIGGINS
20 threatened to harm himself or anyone else. He appeared like a
21 zombie to the jury throughout the entire trial.

22 Many courts have held that freedom from psychotropic
23 medication is a right protected by the Due Process Clause of
24 the Fourteenth Amendment. The United States Court of Appeals
25 in U.S. v. Watson 893 F.2d 977 (8th Cir.), agreed with other
26 courts that the substantive right to be free from unwanted
27 bodily restraint includes the right to refuse psychotropic
28

1 medications. Defendant RIGGINS had the right to refuse the
2 medication, and by disregarding his request, the State of
3 Nevada violated his Due Process rights.

4 The Due Process Clause of the Fourteenth Amendment
5 includes liberty interest in the right to privacy, including
6 the right to make one's own decisions about fundamental
7 matters, the rights to personal dignity and bodily integrity,
8 and the right to communicate ideas freely. Bee v. Greaves
9 744 F.2d 1391 (1984). The decision whether to accept
10 treatment with antipsychotic drugs is of sufficient
11 importance to fall within the category of privacy interests
12 protected by the Constitution. DAVID RIGGINS was refused
13 this right to make decisions regarding his body. He
14 requested that the administration of medication be
15 discontinued, and his request was denied.

16 According to the United States Court of Appeals in U.S.
17 v. Charters 829 F.2d 479 (4th Cir. 1987), the government may
18 not force an unconsenting individual to hazard the present
19 danger of antipsychotic medication upon a mere supposition
20 that at some future time the individual may become dangerous.
21 Furthermore, unless it is determined that, without
22 medication, a patient presents an immediate threat of
23 violence that cannot be avoided through the use of less
24 restrictive alternatives, there is no justification for the
25 intrusion into fundamental liberties that forcible medication
26 represents. No other alternatives were ever offered to
27 defendant RIGGINS. Upon arrest he was immediately medicated
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1 with Mellaril and his dosages have been periodically
2 increased, to the outrageous level of 800 milligrams of
3 Mellaril per day.

4 If one is medicated throughout one's trial, while
5 claiming an insanity defense, forcible medication of
6 psychotropic drugs may alter one's demeanor in such a way
7 that it would lead to misimpressions by the jurors. For
8 instance, in U.S. v. Charters 829 F.2d 494 (4th Cir. 1987),
9 the court held that if a defendant is heavily medicated
10 during the trial, the jury may get a false impression of the
11 defendant's mental state at the time of the crime. We
12 believe that to be the case here. Defendant RIGGINS was
13 medicated so heavily that he almost appeared comatose. Dr.
14 Jack Jurasky, the defense psychiatrist, testified that DAVID
15 RIGGINS consumed "enough Mellaril to tranquilize an
16 elephant." (ROA 752).

17 Just as medication can create misimpressions about the
18 defendant's insanity at the time of the crime, its effects
19 can also cause other important misimpressions about the
20 defendant's mental state. Two common side effects of
21 antipsychotic drugs are akinesia which makes the defendant
22 apathetic and unemotional, and akathisia which makes him
23 agitated and restless. As a result, the jury may be misled
24 by the demeanor of a defendant who appears not to care about
25 the crime, the victim, or the proceedings or who appears
26 overly anxious at particular moments.

27 Defendant RIGGINS exhibited akinesia. Throughout the
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trial he appeared apathetic and unemotional. This had a powerful effect on the jury. This was a man on trial for violently murdering someone, who had stabbed someone repeatedly, and it appeared to the jurors that he just didn't care. This image would remain in the juror's minds and did not support his insanity defense. This obviously prejudiced DAVID RIGGINS.

Some courts hold that an instruction to the jury as to the effects of the medication the defendant is currently being administered reduces the problem of the jury not seeing the defendant's "true" demeanor. However, as held by the U.S. Court of Appeals in U.S. v. Charters 829 F.2d 494 n.20 (4th Cir. 1987), a jury instruction cannot ameliorate the negative impact of antipsychotic drugs on a defendant's ability to consult with counsel. Although this type of instruction to the jury reduces the problem of the jury not seeing defendant RIGGINS' true demeanor, it still does not abolish any misimpressions or prejudices they may create about him.

The Supreme Court of Washington in Harper v. State 110 Wash.2d 876, 759 P.2d 361 (1988) recognized that competent adults have a right to determine what shall be done to their bodies. This right should extend to DAVID RIGGINS as he was adjudicated (chemically) competent to stand trial. He should have been competent to make decisions regarding his own body, but he was deprived of that right.

The Supreme Court of Washington also held in State v.

Murphy, 56 Wash.2d 761, 766-67, 355 P.2d 323, 327 (1960), "that a new trial be granted in the event of a showing by the accused, of a reasonable possibility that his attitude, appearance, and demeanor, as observed by the jury, have been substantially influenced or affected by circumstances over which he had no real control." A new trial should be granted in this case as well, because the amount of medication defendant RIGGINS was administered has been clearly demonstrated to have a tranquilizing effect, which altered his demeanor and appearance in front of the jury.

The courts of the state of Washington also ruled on this subject in State v. Maryott, where the court stated that:

"If the State may administer tranquilizers to a defendant who objects, the State then is, in effect, permitted to determine what the jury will see or will not see of the defendant's case by medically altering the attitude, appearance and demeanor of the defendant, when they are relevant to the jury's consideration of his mental condition." 6 Wash.App 96, 101, 492 P.2d 239, 242 (1971).

The State of Nevada, by medicating DAVID RIGGINS against his will, altered his demeanor and determined what the jury would see. As a result, the State of Nevada permitted the jury to see defendant RIGGINS in his medicated state only.

The Maryott court also stated that, "when mental competence is at issue, the right to offer testimony involves more than mere verbalization. The demeanor in court of one who has raised the issue of sanity is of probative value to the trier of fact." Id. The jury in the instant case never saw DAVID RIGGINS in his "normal" undrugged condition. Sanity was the only issue in the present case, and the triers

of fact only saw the defendant's altered demeanor. Consequently, they were never exposed to his insanity which eventually resulted in his receiving a DEATH sentence.

The Maryott court also stated that "it is difficult to see a legitimate state interest in imposing drugs on a defendant who asks to be free from them." Id. at 103, 492 P.2d at 243. The court then went on to say that if controlling a possibly obstreperous defendant is the motive, two alternatives are suggested, "First, no control should be imposed until its need has been demonstrated. Second, the control which is imposed should insure an orderly trial with the least interference with a defendant's rights." Id.

In the present case, the court ignored both alternatives. No need was ever demonstrated for imposing the medication, and substantial interference with the defendant's rights occurred when the State inundated RIGGINS with "enough Mellaril to tranquilize an elephant." (ROA 752).

The State administered 800 milligrams of Mellaril per day during the trial against RIGGINS' will (ROA 740). Psychiatrist Jack Jurasky, an expert witness, testified that 800 milligrams per day is enough to tranquilize an elephant (ROA 752). Courts have held that an accused may not be tried when he is so drugged, because he is in effect, not there at all. Pledger v. United States, 272 F.2d 69 (4th Cir. 1959). Defendant RIGGINS' eyes were open, but nobody was home.

The Supreme Court of Vermont remanded the case of In Re Prey 133 Vt. 253, 257-58, 336 A.2d 174, 177 (1975) for a new

trial where the defendant had been heavily drugged during the trial, and it was held that "it may well have been necessary, in view of the critical nature of the issue, to expose the jury to the undrugged, unседated Gary Prey, at least insofar as safety and trial progress might permit." The jury in the present case should have been exposed to the "undrugged, unседated" DAVID RIGGINS as far as safety and trial progress would have permitted, especially since his defense was his insanity at the time of the offense.

The facts of Commonwealth v. Louraine, 390 Mass. 28, 453 N.E.2d 437 (1983), are similar to the present case. In Louraine, the defendant was not taking antipsychotic medication at the time of the homicide, but while in custody, was receiving antipsychotic medication in various forms and doses, among which was Mellaril. At trial, the defendant was under the influence of "heavy" or "maximum" dosages of Stelazine, another antipsychotic medication utilized for the management of the manifestations of psychotic disorders. Id. at 33, 453 N.E.2d at 441.

In Louraine, the Supreme Court of Massachusetts cited the "universally accepted rule that, when a defendant's sanity is at issue, the trier of fact is entitled to consider the defendant's demeanor in court." Id. at 34, 453 N.E.2d at 442. The court further stated, "if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked at the time of the crime, substantial capacity either to appreciate the wrongfulness of

his conduct or to conform his conduct to the requirements of the law." Id. This appears to have occurred in the present case. DAVID RIGGINS looked apathetic and unemotional to the jurors. Therefore, they discounted testimony that he lacked the capacity at the time of the crime to appreciate the wrongfulness of his conduct. As a result, they sentenced him to DEATH by lethal injection, rather than providing him an opportunity for rehabilitation to overcome his mental illness.

According to the court in Matter of Orr 531 N.E.2d 73 (Ill.App. 4 Dist. 1988), a recipient may refuse medication absent an emergency situation unless under the **parens patriae** doctrine he has been adjudicated incompetent in a separate proceeding. Defendant RIGGINS was never found incompetent, although he was examined on defense's request. He was placed on medication and then examined and found to be competent to stand trial.

DAVID RIGGINS had no control over the antipsychotic medication being administered to him because his Motion to Terminate the Administration of Medication was denied. He was medicated against his will. There is no doubt that his attitude, appearance and demeanor were affected by the medication.

When the state insists on the medication of the insanity defendant as a condition of his being "competent" to stand trial, such compulsory medication lightens the state's evidentiary burden at trial, making it easier for the state

to rebut the defendant's contention that he was insane at the time of the offense. This medication denies the defendant the evidence he needs to demonstrate convincingly his insanity, and deprives him of his right to be the master of his own fate, violating the basic constitutional precept of deference to personal autonomy. Fentiman, *Whose Right is it Anyway?: Rethinking Competency to Stand Trial in the Light of the Synthetically Sane Insanity Defendant*. 40 U. Miami L.Rev. 1168 (1986).

During trial, DAVID RIGGINS was under the influence of 800 milligrams of Mellaril per day. This medication violated his right to a "full and fair" trial by denying him the ability to assist in his defense, and by prejudicing his demeanor, appearance, and attitude to the jury.

The court's refusal of DAVID RIGGINS' Motion to Terminate the Administration of Medication, violated his right to a "full and fair" trial because the jury never saw his actual demeanor, which could have demonstrated his insanity. The overwhelming majority of case law supports this view.

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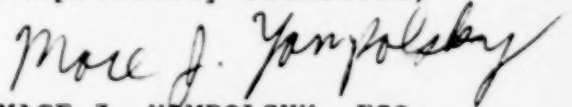
LAW OFFICE OF
MACE J. YAMPOLSKY
ATTORNEY AT LAW
520 SOUTH 4TH STREET
LAS VEGAS, NEVADA 89101-6503
(702) 384-5563

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CONCLUSION

The State of Nevada drugged defendant RIGGINS into an unnatural state of chemical competency. The trial court allowed the State to drug defendant RIGGINS against his will into zombie-like competency, thereby depriving him of his right to a full and fair trial. This court should reverse the court below, and remand this case to the trial court and order a new trial of DAVID RIGGINS in an unmedicated state.

Respectfully Submitted,



MACE J. YAMPOLSKY, ESQ.
Nevada Bar No. 001945
520 South Fourth Street
Las Vegas, Nevada 89101
(702) 384-5563

Attorney for Petitioner